



IN THE

Supreme Court of the United States

Term,

No. **77-253**

JOHN A. DECARLO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA
(WESTERN DISTRICT)**

STANLEY W. GREENFIELD,
JOHN W. MURTAGH, JR.,
GREENFIELD & MINSKY,
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**PETITION FOR A WRIT OF CERTIORARI TO
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(PITTSBURGH DIVISION)**

Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Supreme Court of Pennsylvania entered herein on May 11, 1977, denying Petitioner's petition for allowance of appeal (Appendix).

Jurisdiction

The final order of the Supreme Court of Pennsylvania was made and entered on May 11, 1977, (Appendix). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Does a trial Court's review of the evidence in its charge to the jury, in a case wherein the Defendant presents no testimony, so unfairly emphasize the prosecution's case as to violate the Defendant's right to due process of law?

Constitutional Provisions Involved

The Constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution.

Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV provides:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner was tried before a jury in the Court of Common Pleas of Beaver County, Pennsylvania, on charges of burglary and criminal conspiracy. The jury returned a verdict of guilty on October 30, 1975, before the Honorable John N. Sawyer, P.J.

The evidence for the prosecution, presented through six police officers, demonstrated that the Petitioner was observed on the sidewalk in front of a furniture store, which was closed for the day, where a number of other men were gathered, at a time when two of the other men entered the furniture store by opening a door. Petitioner was arrested shortly afterward, while walking alone on the public sidewalk. After Petitioner's Demurrer was denied, counsel waived opening and the defense rested without offering any testimony. The case was concluded in less than one day.

In the course of its charge to the jury, the Trial Court fully reviewed the evidence, detailing the testimony of each of the prosecution witnesses. At the close of the Court's charge, counsel for the Petitioner objected:

The Court: Are there any objections, amendments, or corrections to the Charge, Mr. Greenfield?

Mr. Greenfield: May we approach the bench, Your Honor?

The Court: You may do so. (Whereupon, the following transpired at side-bar:)

SIDE BAR

Mr. Greenfield: There are only two, Your Honor. One, I would respectfully ask the Court to instruct the jury that an Indictment is not evidence; and, second, I

have made this second objection in other cases—it has nothing to do with Your Honor specifically, except Your Honor's review of the evidence in this case, under the circumstances where the defense did not put in any testimony, accentuates the absence of that, and while I know that Judges in our Common Pleas Courts are constrained to review the evidence, which is exactly what you did, I am preserving the point it is fundamentally unfair for any Defendant to have that done in a situation where he presents no evidence, because the obvious effect is to emphasize the one side to the detriment of the other (Trial transcript 117-118).

This issue was further raised on appeal to both the Superior and Supreme Courts of Pennsylvania.

Petitioner was sentenced to a term of not less than six months nor more than two years, less one day, and to pay a fine of One Thousand (\$1,000.00) Dollars.

Upon his conviction, Petitioner filed Motions for New Trial and Arrest of Judgment, upon denial of which an appeal to the Superior Court of Pennsylvania followed. The Superior Court of Pennsylvania affirmed Petitioner's conviction without opinion. A Petition for Allowance of Appeal was filed with the Supreme Court of Pennsylvania, which Court denied the Petition without opinion.

Reasons Relied on for the Allowance of the Writ

A trial Court's review of the evidence in its charge to the jury, in a case wherein the Defendant presents no testimony, so unfairly emphasizes the prosecution's case as to violate the Defendant's right to due process of law.

The Commonwealth presented the testimony of five State Troopers and a Borough of Rochester Police Officer who

testified as to the circumstances surrounding the arrest of Appellant. After Appellant's Motion for a Demurrer was denied, Appellant waived opening and presented no defense (T. 95). The case was concluded in less than one day. In its charge to the jury (T. 95-118; 119-120), the Court fully reviewed the evidence detailing the testimony of each of the Commonwealth's witnesses (T. 105-113).

Although it has been held to be a good practice to review the evidence before submitting a criminal case to a jury, *Commonwealth v. Amecca*, 160 Pa. Super. 257, 50 A.2d 725 (1947), that practice we suggest is fundamentally unfair in that instance, as here, where Defendant presents no evidence, for it necessarily accentuates the prosecution evidence while at the same time highlighting the absence of any affirmative defense, all to the obvious detriment of the Defendant. This Court, in *Lisenba v. California*, 314 U.S. 219, 625 S. Ct. 280 (1941) has stated:

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice (314 U.S. at 236, 625 Ct. at 290).

This concept was favorably noted by this Court recently in *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 945 S.Ct. 1863, 1871 (1974).

Undue emphasis in a charge for either side is error. *Hayes v. Pennsylvania R.R.*, 195 Pa. 184, 45 A.925 (1900). Moreover, the Court must not make the testimony of one side conspicuous without in any way adverting to the other without committing reversible error. *Hayes, supra*.

In a civil context our Superior Court long ago held that:

"A judgment in favor of plaintiff will be reversed where the Trial Court in its instructions emphasized the

evidence in favor of plaintiff, and minimized the evidence in favor of defendant." *McCabe v. City of Philadelphia*, 12 Pa. Super. 383 (1900).

Nor is it essential that every detail of evidence be commented upon by the Trial Judge in presenting the respective theories of the parties to the jury. *Wally v. Clark*, 263 Pa. 322, 106 A.542 (1919). Research discloses no statutes or case law requiring the Trial Judge to comment upon all the testimony; nor is such required by the Pennsylvania Rules of Criminal Procedure (see, Rule 1119).

Review of the testimony is appropriate as a useful device to assist the jury where the evidence and testimony are lengthy, the issues involved, and the contentions of the parties multiple. None of these factors are present here.

In its Standards Relating to Trial by Jury, the ABA project on Minimum Standards for Criminal Justice comments, at page 126, 1968 Approved Draft:

"Section 4.7 (b) (i) provides that the Court may analyze the evidence and 'draw the attention of the jury to important portions of the evidence . . . ' Section 4.7 (b) (i) also emphasizes that it is the responsibility of the Court, in summarizing and commenting on the evidence, to ensure that he does not merely state the evidence of the prosecution or that of the defense." (Emphasis added).

It may be noted that Section 4.7(b)(i) has been endorsed by the Joint Council on Criminal Justice Standards, comprised of representatives of both the Pennsylvania Bar Association and the Conference of State Trial Judges; see, *Comparative Analysis of ABA Standards with Pennsylvania Law, Rules, and Legal Practice*, Joint Council on Criminal Justice Standards (March, 1974).

While it is within the discretion of the Trial Judge in Pennsylvania to summarize for the benefit of the jury the evidence adduced at trial, *Commonwealth v. Crawford*, 452 Pa. 326, 305 A.2d 893 (1973):

"In doing so, however, the judge must bear in mind that his 'influence . . . on the jury is necessarily and properly of great weight . . . and jurors are ever watchful of the words that fall from him.' Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Commonwealth v. Crawford*, *supra*, citing *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S. Ct. 402, 405 (1946).

When, as in the instant case, the entirety of the evidence was presented in the prosecution's case, where the defendant presented no evidence and where the trial was of short duration, so that the jury could retire with a fresh impression of the testimony, an unreasoned application of the usual practice of reviewing the evidence becomes a deprivation of due process.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY W. GREENFIELD,
JOHN W. MURTAGH, JR.,
GREENFIELD & MINSKY,
Attorneys for Petitioner.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania was served upon the Commonwealth of Pennsylvania by mailing said copy, postage prepaid, to the Attorney of Record:

Joseph S. Walko, Esquire
District Attorney of Beaver County
Beaver County Courthouse
Third Street
Beaver, Pennsylvania 15009

STANLEY W. GREENFIELD,
JOHN W. MURTAGH, JR.,
GREENFIELD & MINSKY,
Attorneys for Petitioner.

APPENDIX

Final Order of the Supreme Court of Pennsylvania

THE SUPREME COURT OF PENNSYLVANIA

Western District

Sally Mrvos	801 City-County Building
Prothonotary	Pittsburgh, Pa.
Irma T. Gardner	15219
Deputy Prothonotary	

May 11, 1977

John W. Murtagh, Jr., Esq.
Stanley W. Greenfield, Esq.
Greenfield & Minsky
412 Carlton House
Pittsburgh, Pa. 15219

In Re: DeCarlo v. Commonwealth
No. 1265 Allocatur Docket

Dear Sirs:

This is to advise you that the Court has entered the following Order on your Petition for Allowance of Appeal from the Order of the Superior Court at No. 861 April Term, 1976 in the above-captioned matter:

"5-11-77

Petition denied.

Per Curiam."

Very truly yours,

IRMA T. GARDNER,
Deputy Prothonotary.

ITG:ad

cc: Joseph S. Walko, Esq.

*Appendix—Decision of the Superior Court of Pennsylvania.***Decision of the Superior Court of Pennsylvania**

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 1713/1976

COMMONWEALTH OF PENNSYLVANIA,

vs.

JOHN A. DeCARLO,

Appellant.

No. 861 April Term, 1976

Appeal from the Judgment of Sentence of the Court of
Common Pleas, Criminal Division, of Beaver County, at
No. 716 of 1974.

PER CURIAM:

Filed: Jan 17 1977

Judgment of sentence affirmed.

*Appendix—Order of the Superior Court of Pennsylvania.***Order of the Superior Court of Pennsylvania**

SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

COMMONWEALTH OF PENNSYLVANIA,

v.

JOHN A. DeCARLO,

Appellant.

No. 861 April Term, 1976

ORDER

AND NOW, this 17th day of January, 1977, it is ordered as
follows:

- x Judgment of Sentence Affirmed.
- Order Reversed.
- Order Vacated and lower court directed to
proceed in accordance with opinion filed herewith.
- Order Modified as set forth in opinion filed
herewith.
- Ordered as set forth in opinion filed herewith.
- Costs to be taxed as provided by Chapter 27 of the
Pa. R. A. P.

Appendix—Order of the Superior Court of Pennsylvania.

.... Costs to be taxed as provided in opinion filed
herewith.

BY THE COURT,

IRMA T. GARDNER,
Deputy Prothonotary.

NOTE: Unless another date is hereinafter set forth, the
foregoing order was entered on the docket on the
date set forth above.

Order entered: